Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

YVONNE E. VANCE,

Petitioner,

v.

UNION PLANTERS CORP., ET AL.,
and
UNION PLANTERS BANK, N.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS A DISTRICT COURT'S DETERMINATION OF THE NUMBER OF AN EMPLOYER'S EMPLOYEES, FOR PURPOSES OF APPLYING THE STATUTORY CAPS LIMITING DAMAGES OF 42 U.S.C. § 1981(a), A FACT DETERMINATION SUBJECT TO CLEARLY ERRONEOUS REVIEW, OR A LAW DETERMINATION SUBJECT TO *DE NOVO* REVIEW?

2. IN DETERMINING THE APPLICABILITY OF THE STATUTORY CAPS LIMITING DAMAGES IN CIVIL RIGHTS CASES UNDER 42 U.S.C. § 1981(a), SHOULD THE COURT DETERMINE AN EMPLOYER'S NUMBER OF EMPLOYEES AT THE TIME THE JUDGMENT IS ENTERED, OR AT THE TIME OF THE DISCRIMINATORY ACT?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Yvonne E. Vance, Petitioner;

2. James D. Waide, Esq., Waide & Associates, P.A. Attorney for the Petitioner;

3. S.T. Rayburn, Esq., Rayburn Law Firm, PLLC, Attorney for the Petitioner;

4. Mitchell, McNutt & Sams, former counsel for Petitioner;

5. Union Planters Bank, N.A., Respondent;

6. Lester F. Sumners, Esq., Sumners & Carter, P.A., Attorney for Respondent;

7. Robert M. Carter, Esq., Sumners & Carter, P.A., Attorney for Respondent;

8. First National Bank of New Albany, Mississippi (name changed to Union Planters Bank of Northeast Mississippi), former Defendant, substituted by present Respondent, Union Planters Bank, N.A.

9. Union Planters Corporation, former Defendant, dismissed on Summary Judgment;

10. Grenada Sunburst Bank (name changed to Union Planters Bank of Mississippi), now merged into Union Planters Bank, N.A.;

LIST OF PARTIES – Continued

11. United Southern Bank (name changed to Union Planters Bank of Northwest Mississippi), now merged into Union Planters Bank, N.A.;

12. Charles P. Davis, former Defendant, dismissed on Summary Judgment; and

13. C.R. Collums, former Defendant, dismissed on Summary Judgment.

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The Court of Appeals' Opinion of April 25, 2000, 209 F.3d 438 (5th Cir. 2000), holds that the appropriate time for determining the number of an employer's employees, for the purpose of the statutory cap under 42 U.S.C. § 1981a, is at the time of the discriminatory act. App. 16.

The unreported Opinion of the District Court of February 12, 2001, holds that Defendant banks were a single integrated enterprise for the purposes of determining the applicable caps. App. 43.

The Court of Appeals' reported Opinion of January 10, 2002, 279 F.3d 295 (5th Cir. 2002), holds that the Defendant banks were not a single integrated enterprise. App. 1.

The Court of Appeals' Order denying Petitioner's Petition for Rehearing en banc of February 13, 2002 is unreported. App. 53.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 10, 2002, Petition for Rehearing En

Banc denied February 13, 2002, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981(a), provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Federal Rule of Civil Procedure 52(a) provides:

> . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

STATEMENT OF THE CASE

A jury in the United States District Court for the Northern District of Mississippi determined that Petitioner, Yvonne Vance, had been discriminated against because of her gender, and awarded damages exceeding $300,000.00. On post-trial motion, the District Court determined that the applicable time for determining the number of an employer's employees for the purposes of

the statutory caps on damages under 42 U.S.C. § 1981(a) is the time of the discriminatory act, not the time of the judgment, and reduced the damages to $300,000.00.

On appeal, the United States Court of Appeals for the Fifth Circuit upheld the jury's determination that Petitioner had been discriminated against on the grounds of her sex. But the Appeals Court held the District Court erred in determining statutory caps at the time of judgment. It remanded the case for determination as to whether the various corporate entities involved were a "single integrated enterprise", such that the $300,000.00 limitation on damages for employers with more than 500 employees applied, or whether the entities were truly separate, such that the company had less than 500 employees and a $100,000.00 cap applied. *Vance v. Union Planters Corp.*, 209 F.3d 438 (5th Cir. 2000).

On remand, the District Court determined that the various corporate entities involved in the hiring decision were a "single integrated enterprise", and reimposed its earlier judgment finding the applicable cap was $300,000.00, under 42 U.S.C. § 1981(a).

On a second appeal, the United States Court of Appeals determined that the standard of review was *"de novo"*. Applying this standard, it reversed the District Court's decision, finding there was not a single integrated enterprise and reduced the damages to $100,000.00 under 42 U.S.C. § 1981(a)(b)(3). *Vance v. Union Planters Corporation, et al.*, 279 F.3d 295, 302 (5th Cir. 2002). On February 13, 2002, the Court of Appeals denied the Petition for Rehearing.

FACTS

This sex discrimination case arises out of the merger of banks owned by various subsidiaries of Union Planters Corporation. Banks formerly belonging to the United Southern Bank, and the Grenada Sunburst Bank, both owned by Union Planters Corporation, a Memphis Corporation, were merged in July, 1995, under the leadership of First National Bank of New Albany, still another subsidiary of Union Planters Corporation. R. Vol. 1, Doc. 1; R. Vol. 6, Doc. 123, 126, 168; R. Vol. 7, Doc. 130, T. Vol. 8, pp. 318-19.

During the process of this merger, Petitioner, who has been president of a branch bank in Oxford, Mississippi, was not chosen to head a newly merged bank, and a man with no experience in the relevant market was chosen for the job. R. Vol. 1, Doc. 1, R. Vol. 6, pp. 123, 126, 168, R. Vol. 7, Docket 130.

A jury found Petitioner was the victim of gender discrimination and awarded her over $300,000.00 in compensatory and punitive damages. On post-trial motion, the District Judge ruled the applicable statutory cap should be determined at the time of the judgment, not at the time of the discriminatory act, and left allowable damages at $300,000.00 under 42 U.S.C. § 1981(a)(b)(3), which allows up to $300,000.00 in damages for employers having over 500 employees.

The United States Court of Appeals for the Fifth Circuit upheld the determination of liability, but held that the applicable time for determination of damages was the

time of the discriminatory act, not at the time of judgment. It remanded the case for further factual determination by the District Court. In remanding the case, the Fifth Circuit specifically instructed the district court to determine whether nominally independent entities, First National Bank, Sunburst Bank and United Southern Bank, were a single employer for purposes of Title VII and to determine who would have been Petitioner's employer before July 1995, had she been offered the job. The district court made detailed factual findings, finding that the various subsidiary banks involved in the non-hiring of Petitioner were an "integrated enterprise", and further found that Petitioner's employer prior to July 1995, had she been offered the job, would have been Sunburst Bank, which alone had more than 500 employees. The District Court found, therefore, that the applicable statutory cap was $300,000.00 under 42 U.S.C. § 1981(a)(b)(3). On a second appeal, the Fifth Circuit determined that it would review the matter *"de novo"*. Following this *de novo* review, the Appeals Court found that the various banks involved were not a single integrated enterprise, and that only a single subsidiary corporation made the discriminatory decision, and that subsidiary corporation had less than 500 employees. Therefore, it held the applicable statutory cap was $100,000.00 under 42 U.S.C. § 1981(a)(b)(3)(b), and reduced the judgment accordingly.

REASONS FOR GRANTING CERTIORARI

REASON I.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER A DISTRICT JUDGE'S FACTUAL FINDINGS AS TO THE APPROPRIATE EMPLOYER FOR THE PURPOSES OF DETERMINING THE STATUTORY CAPS UNDER 42 U.S.C. § 1981(a) IS A FACTUAL DETERMINATION, WHICH CANNOT BE REVIEWED *DE NOVO*.

The United States Court of Appeals for the Fifth Circuit held that the determination of which employers were to be counted for the purposes of the statutory cap was a "fact-intensive determination", but nevertheless held that it would "review the District Court's decision *de novo*." 209 F.3d 438 (5th Cir. 2000), citing *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236, 1244 (11th Cir. 1999). This determination to review a district court's detailed factual findings *de novo* conflicts with *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) which held:

> Rule 52a broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to include certain categories of factual findings from the Court of Appeals to accept a District Court's findings unless clearly erroneous.

A finding that the review it was making was "fact-intensive" and, nevertheless, undertaking the review "*de novo*" conflicts with *Lihli Fashions Corp. Inc. v. N.L.R.B.*, 80 F.3d 743, 747 (2nd Cir. 1996) which held that whether several companies are a single enterprise is factual in nature, subject only to review for clear error. Similarly, the issue of "single employer" status was held factual in

nature and subject to the clearly erroneous standard of review, in *N.L.R.B. v. Al Bryant, Inc.*, 711 F.2d 543 (3rd Cir. 1983), and *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999).

Thus, the Fifth Circuit's determination that a District Court's finding of fact that several purportedly separate employers are, in fact, a single, integrated enterprise will be reviewed *de novo* conflicts with the ruling on this precise question by other circuits. This conflict indicates this case is appropriate for this Court's review.

REASON II.

THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER THE NUMBER OF EMPLOYEES OF DISCRIMINATING EMPLOYER IS DETERMINED AT TIME OF JUDGMENT, OR AT THE TIME OF THE DISCRIMINATORY ACT.

The complex factual inquiry of whether the various subsidiaries of Union Planters Corporation were a single integrated enterprise would not have been necessary had the Fifth Circuit followed the District Court's determination that the appropriate time to determine the applicable number of employees is the date of judgment, not date of trial. By the time of trial, the various corporate Defendants involved in the decision had all been merged into a single corporation. R. Vol. 6, document 117. The new corporation, Union Planters Bank, N.A., was a single corporation made up of all previous subsidiaries of Union Planters Corporation. R. Vol. 6, Doc. 117, 168. The District Court determined that since the Congressional intent in enacting the corporate caps was to protect small businesses, the appropriate time to judge the number of

employees was at the time of the trial, since that time would most accurately describe the Defendants' financial ability to respond to a large judgment.

The Court of Appeals rejected this rationale, relying upon several cases decided under 42 U.S.C. § 2000e(b), which hold that, under Title VII, the term "employer" is to be defined at the time the act of discrimination occurred. However, 42 U.S.C. § 2000e(b), defines those "employers" which are liable for discrimination. Under 42 U.S.C. § 2000e(b), only employers which have more than fifteen employees are liable for unlawful discrimination. It is perverse to hold that an act of discrimination which occurred when the employer had less than fifteen employees and was lawful, could then become unlawful years later, or decades later, if the employer were to grow to have more than fifteen employees. Whether an act is legal or illegal must be determined when the act occurs.

The Court of Appeals acted illogically in extending cases decided under 42 U.S.C. § 2000e(b) as controlling for the different purposes of determining the statutory caps under 42 U.S.C. § 1981(a). The question in determining limitations on the amount of the judgment is not whether a given act is illegal or legal. The issue is: What is the employer's size for purposes of determining its ability to respond to damages awards? The purpose of the caps imposed by 42 U.S.C. § 1981(a) is to protect small business. The purpose is to prohibit small businesses from devastating awards which might destroy them. Congressional Record H 3885 (Remarks of Rep. Gunderson). As stated Congressman Bustamante (Congressional Record H 3885): "It does not make sense to threaten small businesses, the most productive and job-producing sector

of our economy – with the prospect of bankruptcy and ruin for losing a discrimination suit . . . ".

Since the purpose of the caps on damages is to protect small businesses from ruinous judgments, while, at the same time allowing fair compensation for victims, the correct time to determine the amount of the limitation is the time of judgment. It is illogical to apply the cap at the time of the discriminatory act, since the corporation which would then be viewed (the various subsidiaries) no longer exist.

It is an unnecessary twist of logic for the court to concern itself with potentially bankrupting a subsidiary corporation that no longer exists, but has been absorbed into its parent corporation. The only corporation which existed at the time of the judgment was an entity which has more than 500 employees, and has a net worth measured in the billions and was in no danger of bankruptcy. Congress' intent in imposing the statutory caps – to prevent small businesses from ruinous financial judgments – is disserved by an interpretation which looks back to an economic situation which no longer exists. The purpose of Congress in permitting compensatory awards to victims, while protecting small businesses against ruinous judgments, is best served by measuring the caps at the time of judgment.

The illogic of the Court of Appeals' determination that the 42 U.S.C. § 1981(a) cap is determined at the time of the discriminatory act, rather than at the time of judgment is seen by examining the case of a hypothetical employer in the process of downsizing. What if an

employer, at the time of the discriminatory act, was prosperous, had in excess of 500 employees, but by the time of trial had experienced huge losses and was experiencing layoffs? Assuming that this employer by the time of trial had less than 100 employees, the Congressional intent of protecting small business from bankruptcy is frustrated by determining the statutory caps at the time of the discriminatory act, rather than at the time of trial. The Congressional intent of protecting small businesses from bankruptcy can be served best by measuring the size of the defendant at the time of judgment. Measuring the number of employees at the time of the discriminatory act has the potential effect of frustrating Congressional intent, by allowing devastation of small business with huge judgments.

Given that Congress, in enacting 42 U.S.C. § 1981(a) had in mind the obvious goal of protecting small business from huge judgments, the Court of Appeals' determination that it would measure the number of employees at the time of the discriminatory act, rather than at the time of the trial, frustrates Congressional intent. Because this Court should implement the intent of Congress, and not permit the lower Courts to frustrate it, the Writ should be granted.

CONCLUSION

Congress amended various civil rights statutes in 1991 to permit juries to award compensatory damages. In doing so, it imposed limitations on the amount of recoverable damages. 42 U.S.C. § 1981(a). This Court has not

yet had the opportunity to give the lower courts guidance on applying these limitations. This case presents the Court with the opportunity to afford the necessary guidance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 01-60216

YVONNE E. VANCE,

Plaintiff-Appellee,

VERSUS

UNION PLAINTERS CORP., ET AL.,

Defendants,

UNION PLANTERS BANK, N.A.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi

(Filed Jan. 10, 2002)

Before JONES and DeMOSS, Circuit Judges, and FELDMAN,* District Judge.

DeMOSS, Circuit Judge:

Plaintiff Yvonne Vance sued Union Planters Bank, N.A. under Title VII, alleging gender discrimination. A jury awarded her $30,000 for lost wages and benefits, $20,000 for emotional distress, and $390,000 in punitive damages. The district court later reduced the compensatory and punitive damage awards to $300,000 to comply

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* District Judge of the Eastern District of Louisiana, sitting by designation.

with Title VII's statutory limits on employer liability. 42 U.S.C. § 1981a(3)(D).

On appeal by Union Planters, we affirmed the district court's judgment as to liability. *Vance v. Union Planters Corp.*, 209 F.3d 438, 447 (5th Cir. 2000) [*Vance I*]. However, because we determined that the record was not sufficiently developed to determine the amount of the applicable damage cap, we vacated the damages award and remanded to the district court for further discovery and an evidentiary hearing.

On remand, the district court set a time period for discovery and a briefing schedule for the parties to submit evidence and arguments to the court. After reviewing the parties' voluminous submissions, the court concluded again that the judgment was subject to a $300,000 Title VII cap. Union Planters then brought this appeal. Because we determine that $100,000, rather than $300,000, is the applicable statutory cap, we modify the damages portion of the district court's judgment.

I. THE DAMAGES CAP

The limitations on Title VII compensatory and punitive damages is found in 42 U.S.C. § 1981a(b), which provides:

> (3) Limitations
>
> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and

the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3). For purposes of this statute, we have held that the "current year" refers to the year in which the discriminatory act took place, not the year of judgment. *See Vance*, 209 F.3d at 446; *cf. Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.4 (5th Cir. 1980).

The statute limits allowable damages based on the number of employees employed by the employer in the current year, but it is silent about how to identify the relevant employer. Thus, when there is more than one entity involved, either through a parent/subsidiary or a joint-employer relationship, the question becomes: Which

entities' employees are counted for purposes of calculating the damages cap? Pertinent to this inquiry is the question of whether the complaining employee in a particular case was denied a new job with a *new* employer (i.e., a "failure to hire" claim), or whether the complaining employee was denied a transfer to another nominally independent, but sufficiently interrelated, entity (i.e., a "failure to promote" claim).

In *Trevino v. Celanese Corp.*, we provided some direction on how to identify the relevant entity or entities in these types of cases:

> Ordinarily, promotion is perceived as occurring within a single company or organization. It is clear, however, that an employee may also be promoted, or denied promotion, from one to another nominally independent entity, provided these two entities' activities, operations, ownership or management are sufficiently interrelated. Whether transfer from one workforce to another constitutes a "promotion" or a "hiring" depends on the facts of each particular case; however, the degree of interrelatedness between companies required before an employee will be considered to have been "promoted" as he transfers from one to the next cannot reasonably be said to exceed that degree of connexity which the courts require for a finding of joint employer or integrated enterprise status.

701 F.2d 397, 403 (5th Cir. 1983). Factors we consider to determine if distinct entities constitute an integrated enterprise are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Id.* at 404.

"Courts applying this four-part standard in Title VII and related cases have focused on the second factor: centralized control of labor relations." *Id.* "This criterion has been further refined to the point that '[t]he critical question to be answered then is: What entity made the final decisions regarding employment matters related to the person claiming discrimination?' " *Id.*

II. BACKGROUND

Whether two employers are engaged in an integrated enterprise for purposes of Title VII is a fact intensive determination. *Id.* at 403. Thus, a review here of the relevant facts, some of which are already set forth in our *Vance I* opinion, is necessary. Union Planters Corporation (UPC), which already owned 100% of First National Bank of New Albany (FNB) and 100% of United Southern Bank (USB), agreed in July 1994 to purchase 100% of Grenada Sunburst Bank (Sunburst) effective December 31, 1994. *Vance I*, 209 F.3d at 440.

Following UPC's purchase of Sunburst, Sunburst's name was changed to Union Planters Bank of Mississippi (Sunburst/UPBMS); USB's name was changed to Union Planters Bank of Northwest Mississippi (USB/UPBNW); and FNB's name was changed to Union Planters Bank of Northeast Mississippi (FNB/UPBNE). *Id.* UPC appointed Pat Davis, who had previously been the president of FNB, to run FNB/UPBNE. *Id.* Because both Sunburst/UPBMS and USB/UPBNW had branches in Oxford, UPC decided that these branches were to be consolidated into

FNB/UPBNE's Oxford branch.[1] *Id.* Davis was charged with hiring a president for this newly consolidated Oxford bank branch. *Id.*

Yvonne Vance, the plaintiff, had been president of Sunburst's branch in Oxford, Mississippi, for seven years and she applied for the position of president of the new consolidated branch. *Vana I*, 209 F.3d at 440. However, on March 15, 1995, Davis hired Tom Carroll instead of Vance to fill this position.[2] *Id.* Vance sued Davis, UPC, Sunburst/UPBMS, USB/UPBNW, and FNB/UPBNE for gender discrimination. After conducting depositions, Vance agreed that all defendants should be dismissed except UPC and FNB/UPBNE. In January 1998, the district court also dismissed UPC, concluding that UPC and FNB/UPBNE did not constitute a single integrated enterprise. Thus, the only remaining defendant was FNB/UPBNE. Later in 1998, Sunburst/UPBMS, USB/UPBNW, and FNB/UPBNE merged with Union Planters Bank, N.A. (UPBNA). Consequently, UPBNA was substituted as the defendant for FNB/UPBNE.

The trial was finally held, and the jury concluded that Davis had engaged in illegal gender discrimination in passing up Vance for this position. *Id.* at 439. It awarded Vance $30,000 for lost wages and benefits, $20,000 for emotional distress, and $390,000 in punitive damages. UPBNA argued to the district court that the

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[1] FNB/UPBNE, Sunburst/UPBMS, and USB/UPBNW were separately chartered banks with other branches in locations other than Oxford.

[2] At the time, Tom Carroll was serving as an administrative assistant to Don Ayres, president of Sunburst.

punitive and compensatory damages should be reduced to $100,000 because FNB/UPBNE only employed approximately 140 people at the time the discriminatory act occurred. *See* 42 U.S.C. § 1981a(b)(3) (capping damages at $100,000 for employers with "more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year"). However, the district court concluded that the date of judgment, rather than the date of the discriminatory act is the date on which the employee count is relevant under § 1981a. Then it noted that UPBNA, the newly consolidated bank and the substituted defendant, had well over 500 employees on the date of judgment. Alternatively, the court suggested that "no single subsidiary" could realistically be considered Vance's would-be employer; thus, the "discriminatory act was done on behalf of a large corporation." Accordingly, it capped the compensatory and punitive damages at $300,000, the relevant cap for employers with more than 500 employees. *See* 42 U.S.C. § 1981a(b)(3)(D).

The bank appealed, and this Court affirmed as to liability. *Vance I*, 209 F.3d at 440. However, we disagreed with the district court's conclusion that, for purposes of § 1981a's cap on damages, the employer's size is measured at the date of the verdict. *Id.* at 446. Instead, we explained, the year of the discriminatory act is the correct measure. *Id.* Thus, we remanded for the district court to determine the relevant employer and employer size on the date the discriminatory act occurred.

On remand, the district court focused on March 15, 1995, as the date the discrimination took place. It then concluded that Sunburst/UPBMS was the relevant

employer at this time for purposes of counting employees to apply the damage cap. The court began by noting that Carroll, the person hired instead of Vance, remained on Sunburst/UPBMS's payroll until March 31, 1995. Thus, it reasoned that if Vance had been hired on March 15th instead of Carroll, she would have likewise remained on Sunburst/UPBMS's payroll until March 31, 1994. For this reason, the court found that Sunburst/UPBMS was Vance's prospective employer whose employees should be counted in calculating the damage cap. The parties do not dispute that on March 15, 1995, Sunburst/UPBMS had more than 500 employees.

Alternatively, the district court concluded that, based on the factors this Court articulated in *Trevino*, 701 F.2d at 403-404, Sunburst/UPBMS, USB/UPBNW, and FNB/UPBNE constituted a single integrated entity for purposes of the damage cap. Because these three entities had an aggregate total number of employees well in excess of 500, the court concluded that the appropriate measure of compensatory and punitive damages under § 1981a(b)(3) was $300,000. UPBNA appeals again to this Court.

III. ANALYSIS

We review the district court's decision *de novo*. *Llampallas v. Mini-Circuits*, 163 F.3d 1236, 1244 (11th Cir. 1999). There is no dispute as to the number of employees employed by each subsidiary in 1995; FNB/UPBNE had approximately 140 employees, and Sunburst/UPBMS and USB/UPBNW each had more than 500 employees each. Thus, we must first resolve the question of who would have been Vance's employer had she been offered the

position of president of the new branch. Then, only if we decide that Vance's would-be employer had less than 500 employees in 1995 need we reach the second question of whether the three subsidiaries, Sunburst/UPBMS, USB/UPBNW, and FNB/UPBNE, should be considered a single integrated enterprise for purposes of aggregating their employees to calculate the appropriate damages cap.

After carefully reviewing the record and the parties' evidence, we conclude that the district court erred in finding that Sunburst/UPBMS would have been Vance's employer had she been offered the position of president of the new bank. Rather, we conclude that FNB/UPBNE is the relevant employer. We reach this conclusion by reference to Carroll's position after he was hired instead of Vance.

"An individual qualifies as an employer under Title VII solely for purposes of imputing liability to the true employer if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring." *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996). It is clear and undisputed from the record that Davis served "in a supervisory position" for FNB/UPBNE and exercised "significant control over [Carroll's] hiring." *Id.* The evidence reflects that Carroll was hired to run FNB/UPBNE's Oxford branch that would eventually subsume Sunbelt/UPBMS's and USB/UPBNW's Oxford branches. Carroll was hired by Davis, who was president of FNB/UPBNE, and it is undisputed that Carroll answered only to Davis and FNB/UPBNE.

Moreover, the fact that Carroll remained on Sunburst/UPBMS's payroll for two weeks after being hired

for his new position – a fact the district court considered dispositive – does not alter our analysis.[3] Vance even notes in her brief that during the time that Carroll was not yet on FNB/UPBNE's payroll, he was only "technically assigned" to another bank and that "he reported [only] to Pat Davis who operated FNB. . . . " Regardless of who temporarily paid Carroll, no one has argued that Carroll actually performed work for or was supervised by Sunburst/UPBMS or USB/UPBNW. The bottom line is that the position Vance sought (which Carroll instead received) was that of president of FNB/UPBNE's Oxford branch, not that of a temporary employee of Sunburst/UPBMS or USB/UPBNW.

In sum, we hold that FNB/UPBNE's failure to place Carroll on its payroll for five months does not necessarily mean that FNB/UPBNE cannot be Vance's would-be employer for Title VII purposes. And we conclude that because Davis, acting for FNB/UPBNE, was the sole decision maker about who was hired to act as the branch president, Davis qualified as the discriminating employer for "purposes of imputing liability to the true employer" – FNB/UPBNE. *Id.*

The parties agree that FNB/UPBNE had about 140 employees in 1994. Section 1981a provides that damages cannot exceed, "in the case of a respondent who has more than 100 and fewer than 201 employees, in each of 20 or

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[3] After being hired as president of the new branch in March, Carroll remained on Sunburst/UPBMS's payroll for two weeks, and then he was paid by USB/UPBNW for four months, and then, finally, he began receiving pay from FNB/UPBNE in July.

more calendar weeks in the current or preceding calendar year, $100,000." Accordingly, with FNB/UPBNE as the relevant employer rather than Sunburst/UPBMS, the correct damages cap under § 1981a is $100,000.

Because FNB/UPBNE had less that 500 employees, which represents the upper limit of the damages cap, we must now address Vance's argument that FNB/UPBNE, Sunbelt/UPBMS, and USB/UPBNW constituted a "single integrated enterprise," such that their number of employees should be aggregated in calculating the appropriate damages cap. To properly focus our analysis, we preliminarily note that the question is *not* whether FNB/UPBNE and its parent company, UPC, were integrated enterprises. The district court, in its January 1998 order, applied the *Trevino* factors to correctly hold that UPC was not a single integrated enterprise with FNB/UPBNE.[4] And Vance recognizes as much in her brief.[5]

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[4] UPC, as FNB/UPBNE's parent company, is not liable as Vance's would-be employer absent a finding that UPC and FNB/UPBNE are integrated enterprises. *See Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 735 (5th Cir. 1986) ("[T]he formula of *Trevino v. Celanese Corp.* . . . lets one decide whether a parent company is the *de facto* employer of the plaintiff."). The district court, after reviewing the evidence and applying the *Trevino* factors, concluded that "the plaintiff has failed to create a genuine issue of material fact as to existence of a single integrated enterprise, and therefore, the defendant Union Planters Corporations is entitle to summary judgment as it is not the plaintiff's employer."

[5] In her brief, Vance acknowledges that, prior to our decision in *Vance I*, the district court applied the *Trevino* factors "in the context of the relationship between UPB and FNB (UPBNE)." Thus, Vance properly limits her argument to the contention that Sunbelt/UPBMS, USB/UPBNW, and FNB/UPBNE constitute a single integrated enterprise.

However, the district court, on remand from the defendant's prior appeal, concluded that Sunbelt/UPBMS, USB/UPBNW, and FNB/UPBNE were a single integrated enterprise. It reasoned:

> By analyzing evidence submitted by both parties in light of the *Trevino* factors . . . the court finds that during the relevant time period, in matters of administrative personnel, all decisions were made by Pat Davis in his position as the individual with administrative control over the Oxford branches of SB and USB as well as the President and CEO of FNB and said administrative decisions were on behalf of UPC; as such, SB, FNB, and USB were an integrated enterprise for purposes of Title VII liability.

We disagree. In determining whether distinct entities constitute a single integrated enterprise we have consistently focused, almost exclusively, on "one question: which entity made the final decisions regarding employment matters relating to the person claiming discrimination?" *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir. 1999); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 765 (5th Cir. 1997) ("The critical question is the following: which entity made the final decisions regarding employment matters related to the person claiming discrimination?"); *Chaiffetz*, 798 F.2d at 735 ("We place[ ] highest importance on the second [*Trevino*] factor, rephrasing and specifying it so as to boil down to an inquiry of 'what entity made the final decisions regarding employment matters related to the person claiming discrimination.' ").

We have already determined that FNB/UPBNE was Vance's would-be employer and thus the employer who

discriminated against her by not hiring her as president of the new Oxford branch. Accordingly, to support the district court's finding of joint enterprise between Sunbelt/UPBMS, USB/UPBNW, and FNB/UPBNE, there must be evidence that Sunbelt/UPBMS and USB/UPBNW were instrumental in making the final decision not to hire Vance. There is no such evidence in the record.

The parties do not dispute that Davis, as president and CEO of FNB/UPBNE was the *sole* person charged with making employment decisions about the new bank branch. The district court's reference to Davis' power to make administrative decisions related to the Oxford branches of Sunbelt/UPBMS and USB/UPBNW – the two branches he was charged with merging into the FNB/UPBNE's Oxford branch – is not enough to establish that Sunbelt/UPBMS and USB/UPBNW, which have their own Board of Directors and more than 500 employees each, were engaged in a joint enterprise with FNB/UPBNE. Instead, Davis' limited interim control over two of Sunbelt/UPBMS's and USB/UPBNE's branches, undertaken on behalf of FNB/UPBNE, is more realistically viewed as necessary administrative functions to facilitate the transfer and eventual merger of the two branches into FNB/UPBNE's Oxford branch. In other words, this evidence does not establish that Sunbelt/UPBMS or USB/UPBNE were involved in the decision of whether to hire Vance, or that the labor decisions between FNB/UPBNE, Sunbelt/UPBMS, and USB/UPBNE were so generally intermingled to justify treating them as a single integrated enterprise.

The district court also cited evidence about the interrelationship between UPC and each of its three subsidiaries as proof that FNB/UPBNE, Sunbelt/UPBMS, and USB/UPBNE constituted a single integrated enterprise:

> Union Planters Corporation was interrelated with its subsidiaries, including FNB, SB, and USB during the relevant period. This interrelation included, but was not limited to, filing consolidated reports to the SEC and other federal agencies, filing consolidated tax returns, serving as the centralized payroll entity, and having Common Management Agreements executed and followed by the subsidiaries. Finally, UPC, at the time in question, was the sole owner of 100% of its subsidiaries' stock.

However, this evidence does not establish that the three subsidiaries were interrelated with one another. Rather, this evidence would speak to whether UPC, as the parent company, should be considered a single integrated enterprise with each of its individual subsidiaries. As discussed previously, the district court already correctly concluded in 1998 that UPC and FNB/UPBNE did *not* constitute a single integrated enterprise, as there is no evidence that UPC participated in the decision not to hire Vance. Therefore, because there is no evidence of a sufficient interrelationship between FNB/UPBNE, Sunbelt/UPBMS, and USB/UPBNE to constitute a single integrated enterprise, we conclude that the district court erred by holding the three subsidiaries were interrelated.

IV. CONCLUSION

We conclude that FNB/UPBNE was Vance's would-be employer for purposes of § 1981a. We also reject Vance's argument that FNB/UPBNE, Sunbelt/UPBMS, and USB/UPBNE constitute a single integrated enterprise. The undisputed evidence demonstrates that FNB/UPBNE had approximately 140 employees at the time the discriminatory act occurred. Accordingly, Vance's damages should have been limited by § 1981a(b)(3)(B), which provides that the sum of compensatory damages awarded for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses and the amount of punitive damages" may not exceed $100,000 for a defendant who "has more than 100 and fewer than 201 employers [sic] in each of 20 or more calendar weeks in the current or preceding year."

The jury awarded Vance $30,000 for lost wages and benefits, $20,000 in emotional damages, and $390,000 in punitive damages. The $30,000 of lost wages is not subject to § 1981a(b)(3)'s limitation on damages. 42 U.S.C. § 1981a(b)(2). The remaining awards for emotional distress, $20,000, and punitive damages, $390,000 are subject to the $100,000 limitation. Accordingly, we modify the district court's award to reduce Vance's total award to $130,000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 99-60289

Yvonne E. Vance,

Plaintiff-Appellee,

VERSUS

Union Planters Corporation, et al.,

Defendants,

Union Planters Bank, National Association,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi

April 25, 2000

Before DAVIS, CYNTHIA HOLCOMB HALL* and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Yvonne Vance sued Union Planters Bank, N.A. ("Union Planters"), under title VII, alleging discriminatory failure to promote on the basis of sex. A jury awarded $30,000 for lost wages and benefits, $20,000 for emotional distress, and $390,000 in punitive damages. The district court later reduced the total amount awarded

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* Circuit Judge of the Ninth Circuit, sitting by designation.

to $330,000 because of title VII's statutory limits on employer liability. Union Planters appealed, asserting that (1) no reasonable jury could have found sex discrimination, (2) the court erred in allowing the jury to hear evidence that Union Planters had previously been found to have violated the Equal Pay Act, and (3) the district court erroneously determined Union Planters's size for purposes of the statutory liability limits. We affirm with regard to the first two issues and vacate and remand on the third issue.

I.

Vance had been president of the Oxford, Mississippi, branch of Grenada Sunburst Bank for seven years when the cause of action arose. She performed energetically and successfully in her capacity as branch president and was familiar with the Oxford financial market. Union Planters Corporation, which owned, *inter alia*, First National Bank of New Albany and United Southern Bank, agreed in July 1994 to purchase Grenada Sunburst Bank effective December 31, 1994.

Pursuant to a reorganization plan, Union Planters Corporation announced that it would consolidate its area banks into Union Planters Bank of Northeast Mississippi, N.A. The new bank would be headed by Pat Davis, who previously had been president of First National Bank. Because United Southern and Grenada Sunburst had bank branches in Oxford, the two branches were to be consolidated. Davis was charged with hiring a president for the newly consolidated bank branch.

Vance promptly applied for the job, as did Hardy Farris, the president of the United Southern branch in Oxford. Farris, though, had opted to participate in an early retirement scheme from which Union Planters Corporation refused to release him, making Vance the only viable candidate. Davis met with Vance and asked for hiring recommendations from people in the banking community. Vance's supervisor, Jimmy Brown, gave her a glowing recommendation and told Davis he should immediately hire her to lead the new bank.

Instead, Davis approached Ed Neelly, who was now working for the Grenada Sunburst branch in Tupelo, and offered him the job. Neelly declined and recommended that Davis hire Vance, with whom Neelly had worked for years. Davis told Neelly that he was looking to hire a "mature man." In response, Neelly recommended Tom Carroll as an effective second-in-command at the new bank. Brown also recommended Vance over Carroll. Davis then offered the branch presidency to Butch Collums, who had worked under Davis at First National Bank; Collums rejected the offer.

Davis claims then to have contacted Pete Boone, the former CEO of Grenada Sunburst Bank. Boone denies he was ever contacted, and testified that had he been, he strongly would have recommended Vance over Carroll. Davis contacted Boone's successor, Don Ayres, who, though he testified that he barely knew Vance, recommended hiring Carroll over Vance. Davis then interviewed Carroll, whose job at Grenada Sunburst had been eliminated during that bank's reorganization; Carroll expressed interest in the branch presidency. Davis hired Carroll on March 15, 1995, and offered Vance the number

two position, which she declined. Vance resigned and accepted the number two job at the Bank of Mississippi branch in Oxford, where she soon rose to the position of branch president.

Vance testified that, as a result of her failure to receive the Union Planters branch presidency, she lost between $7,500 and $8,000 in bonuses and $4,050 in § 401(k) contributions. She claimed also to have lost $3,500 in annual pay in her new job and incurred $15,000 to $16,000 in health expenses because of an inability to obtain insurance upon transferring firms. A psychologist who examined Vance and interviewed her friends, testified that her failure to receive the promotion caused her to suffer from depression, agitation, sadness, and shock.

At trial, Vance's counsel asked Davis why he continued to solicit male candidates for the branch presidency when it appeared that Vance was the only qualified applicant. Davis replied that he wanted to hire the "the best guy, the best person, and I saying [sic] that generically." Also at trial, the court denied Union Planters's motion in limine to prevent Vance from asking Davis any questions about previous adjudications in which he was determined to have unlawfully discriminated against women by paying them less than men. The court told Vance's counsel: "You may ask him if he had ever been found to have discriminated against women in this work place as far as pay is concerned without going into the details or the name of a case or anything." Vance asked such a question of Davis, and he responded in the affirmative.

II.

This court has explained that

> [i]n a Title VII action that has been fully tried on the merits, such that the district court has before it all the necessary evidence to make the ultimate finding of discrimination, the factual inquiry is whether the defendant intentionally discriminated against the plaintiff. On review, this court must therefore decide whether the ultimate finding of discrimination by the district court was clearly erroneous. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Davis v. Yazoo Co. Welfare Dep't, 942 F.2d 884, 886 (5th Cir. 1991) (internal citations and quotation marks omitted). We review a verdict under the "reasonable juror" standard. The standard is that

> [t]he court should consider all of the evidence – not just that evidence which supports the nonmover's case – but in a light and with all reasonable inferences most favorable to the party opposed to the motion [to overturn the jury verdict]. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the [c]ourt believes that *reasonable men could not arrive at a contrary verdict*, granting of a motion is proper.

Merwine v. Board of Trustees, 754 F.2d 631, 636-37 (5th Cir. 1985) (emphasis added).

A court should grant a Fed. R. Civ. P. 50(a) motion not only when the non-movant presents no evidence, but also when there is not a *sufficient conflict in substantial evidence* to create a jury question.[1] Importantly, this articulation of the standard of review does *not* require a showing of *substantial evidence* in support of the jury verdict (in the manner that this court looks for substantial evidence in support of certain decisions by administrative agencies). Rather, the standard requires merely a finding of a *sufficient* conflict in substantial (meant as a synonym for "material") evidence. This can be restated as requiring "sufficient material evidence to support the jury's verdict" – the reasonable-juror standard.

Evidentiary rulings are reviewed for abuse of discretion. *See Jon-T Chems., Inc.*, 704 F.2d 1412, 1417 (5th Cir. 1983). The district court's interpretation of title VII's limits on liability is reviewed *de novo*. *See United States v. Santos-Riviera*, 183 F.3d 367, 369 (5th Cir.), *cert. denied*, 120 S.Ct. 597 (1999).

III.

In reviewing a finding of sex discrimination in a case tried to a jury, we examine the record to determine whether sufficient material evidence supports a charge that the plaintiff was treated unfavorably on the basis of sex and that the employer's stated reasons are pretextual. *See Rutherford v. Harris County*, 197 F.3d 173, 181 (5th Cir.

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[1] *Travis v. Board of Regents*, 122 F.3d 259, 263 (5th Cir. 1997) (citation and quotation marks deleted; emphasis added).

1999). Vance introduced sufficient evidence to support the verdict.

During the search process, Davis approached Ed Neelly, a retired branch president, and asked whether he wanted the job of Oxford branch president. Neelly declined the position and recommended Vance for the position. After Neelly turned down the job, Davis told Neelly that he needed a "mature man in the office in Oxford." Neelly testified that at the time he assumed that Davis meant that he was interested in hiring a "mature man" for the number two position at the new bank. Neelly then testified that in retrospect this assumption was incorrect, i.e., that Davis appears to have wanted a "mature man" to head the branch.

The jury reasonably could have inferred that this preference for "a mature man" at the bank colored his decision to hire Carroll over Vance, especially in light of his subsequent actions – hiring Carroll as President and offering Vance the number-two position. Vance also testified that Davis told her he wanted to hire a 40- to 50-year-old man for the number two position because such a person would lend stability and credibility to the bank.

Union Planters argues that these comments were "merely stray" and thus insufficient to constitute a basis for liability. We have held, however, that workplace remarks like Davis's may constitute sufficient evidence of discrimination if the remarks are (1) related to sex; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue.

See Krystek v. University of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999).

Davis's remark that he wanted to hire a "mature man" is certainly related to sex, was said during the process of considering candidates for the job, was uttered by the individual who made the hiring decision, and was obviously related to Vance's job prospects at the Oxford branch. Therefore, the comment qualifies as direct and material evidence of sex discrimination.[2] Even if Vance were the only witness to testify about the statements at issue, though she is not, that would not warrant taking the case out of the jury's hands.[3]

On the witness stand, Davis was asked why he pursued a series of male candidates after it appeared that Vance was the only viable candidate for the branch presidency. He responded, "I wanted to get the best guy, the best person, and I saying [sic] that generically." Vance argues that this "Freudian slip" on the stand evinced Davis's desire to hire a male. Union Planters argues that Davis's remark was merely a slip of the tongue.[4]

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[2] *Cf. Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996) (holding that a company president's instruction to human resources officials that he did not want to hire older workers constitutes sufficient material evidence of age discrimination); *Portis v. First Nat'l Bank*, 34 F.3d 325 (5th Cir. 1994) (holding that a supervisor's statement to a female subordinate that she "wouldn't be worth as much as the men would be to the bank" constituted direct evidence of sex discrimination).

[3] *See id.* at 329 n.10 (holding that "[t]he fact that Portis' case-in-chief consists solely of her own testimony does not prevent her from establishing intentional discrimination").

[4] Union Planters appears to advocate an extension of the "stray remark" caselaw to cover witnesses' statements at trial. It

The comment is susceptible to either construction. In title VII trials, though, the employer is rarely going to concede unambiguously that it intended to violate the law.[5] Because we lack the jury's opportunity to observe Davis's demeanor and hear his voice, and because the statement corroborated Davis's comments that he wanted to hire a "mature man," or a 40- to 50-year-old man, there was sufficient material direct evidence of discrimination to allow a reasonable jury to decide in Vance's favor.

This direct evidence is supported by material circumstantial evidence.[6] For example, Davis never spoke with

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presented no instance in which a court has ever applied its "stray remark" jurisprudence to a witness's trial testimony. Indeed, there are at least three reasons why it would be unwise to do so in this manner. First, the "stray remark" jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined. Second, one of the questions at issue in the *Krystek* test – whether the remark is proximate in time to the employment decision – would always be answered in the negative with respect to testimony at trial, even though words from the dock seem particularly probative of actual state of mine. Third, in-court testimony, unlike a stray remark made in the workplace, allows the jury to evaluate the context of the remark based on its observations of the witness's demeanor. We decline, therefore, to extend the doctrine in this manner.

[5] *Cf. Aikens*, 460 U.S. at 716 (noting that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes").

[6] Citing *Haas v. ADVO Systems, Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999), Union Planters seems to think that to prevail, Vance must provide direct evidence of discrimination. This would be untrue even if Vance had not provided such direct

Pete Boone, Carroll's former boss at Grenada Sunburst Bank, about Carroll's qualifications. Boone testified that had Davis contacted him, he would have told him that Carroll should not even be considered for the job. Davis testified that he called Boone but that his calls went unreturned. Boone's testimony contradicted this.

The jury was entitled to believe Boone's account and conclude that Davis was less than diligent in seeking information about Carroll's qualifications. Davis's testimony concerning the recommendation he sought from Brown, Vance's immediate supervisor, supports this claim.

Brown knew both Vance and Carroll quite well. Nevertheless, after Davis received Brown's "glowing" recommendation in support of Vance's receiving the job, Davis did not bother to discuss Carroll's qualifications with Brown until *after* Carroll was hired. At that time, Brown told Davis that Carroll was "lazy," "not challenged," and that Davis would have to "light a fire under Carroll's ass" to ensure that he would perform his job.

Carroll's personnel file also indicated that he had a tendency to procrastinate and miss deadlines, but Davis never asked to see that file. The jury was entitled to infer from Davis's lackadaisical investigation of Carroll's qualifications and premature hiring of Carroll that he was predisposed to select a man.

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evidence. *See, e.g. Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) (holding that "[b]ecause direct evidence is rare in discrimination cases, a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion").

There also was uncontradicted evidence that Davis offered the presidency to Ed Neelly and Butch Collums, two men who never applied for the position. The parties dispute whether Davis also offered the job to Hardy Farris. The jury could reasonably infer from these actions that Davis was predisposed to hire a man and began grasping at straws when it appeared that Vance was the only viable applicant. In sum, sufficient evidence supports the finding that Union Planters discriminated against Vance on the basis of sex.

Sufficient evidence also supports the jury's decision that pretext motivated Union Planters's justifications for hiring Carroll over Vance. Union Planters argues that administrative concerns were determinative in the decision. To prevail, Union Planters must provide direct or circumstantial evidence to rebut that explanation for its employment decision. *See Rutherford,* 197 F.3d at 184.

The jury heard credible evidence that Vance's administrative skills were at least as strong as Carroll's. The uncontradicted evidence was that the branch Vance had helped start and later led had experienced dramatic increases in both size and profits. Vance testified that she dedicated thirty percent of her work time to administrative matters. The jury could infer from the branch's success that Vance's administrative skills were excellent.

On the other hand, Carroll was available to fill the branch presidency because he had been demoted from his administrative position at the Sunburst bank. The jury could infer from this that Carroll's administrative skills did not motivate Davis to hire him.

Davis admitted that he thought Vance worked longer hours than did Carroll. The jury could infer that someone who would put more time into the complex task of merging two bank branches would be a better administrator. Some evidence *did* suggest that Carroll's administrative skills were superior to Vance's, but the evidence did not, by its strength; disallow supported inferences in Vance's favor.

IV.

Union Planters claims this case is "controlled" by *Scott*, in which a would-be professor of legal writing sued after failing to be named to the post, claiming age discrimination. She propounded but failed to establish the argument that she was plainly better qualified than the selected individual, who was younger than the age-protected class of which she was a part; beyond this argument, she had no evidence, direct or circumstantial, of age discrimination. *Id.* at 497-98. In overturning the verdict in favor of Scott, we held that "an employee's subjective belief of discrimination, however genuine, cannot be the basis of judicial relief." *Id.* at 507 (citations omitted).

Similarly, in *Travis*, we overturned a verdict because the only evidence that a hiring decision was motivated by sex bias was a comment, made seven years prior to the relevant promotion decision by a supervisor who had in the intervening years retired and thus played no role in the complained of failure to promote, that the plaintiff was not "tough enough" to fill a certain position. *See Travis*, 122 F.3d at 264. As the court noted, this comment was a "stray remark" in that it was made by a supervisor

other than the one who made the relevant employment decision; it was made remotely from the time of that decision; and it did not obviously call into question the issue of sex. *Id. See also Krystek,* 164 F.3d at 254, 256 (same).

These cases do not control. Vance provided both direct, non-stray-comment evidence that she had been discriminated against because of her sex and circumstantial evidence that indicated that she was the only woman president involved in the consolidation and the only president not provided a place in the new organization, though a place existed for her. This evidence does not, but need not, establish that Vance was "clearly better qualified." Rather, her circumstantial evidence, with the direct evidence (including a comment by the relevant supervisor) that her supervisor wanted to hire males provides sufficient evidence that she was discriminated against because of sex.

Union Planters also argues that the jury erred in awarding Vance damages for emotional distress. Union Planters attempts to undermine Vance's expert medical testimony by asserting that because neither Neelly nor Carroll suffered psychological trauma when they lost their jobs, no reasonable fact finder could have concluded that Vance suffered such an injury. As Union Planters so colorfully notes, "[b]ankers lending the money of others should be more resilient." We have discovered, however, no caselaw supporting a "banker's exception" to the rule that plaintiffs who suffer emotional distress can recover damages.

V.

Union Planters contends that the district court erred in admitting evidence that Union Planters suffered an adverse verdict against it in a 1990 pay discrimination case. We note initially that we evaluate the jury's findings without regard to this testimony and conclude that, even in exclusion of this exchange, the evidence supports the verdict.

The relevant evidence is as follows:

> Q. And in the past, you have – you have been found to discriminate against women, women loan officers in their pay as against male officers; haven't you, sir?
>
> A. Yes, sir.
>
> Q. All right, sir.
>
> A. 1990, I think it was. I cannot recall the exact date.

Union Planters raises two issues with respect to this colloquy. The first, that the admission of this evidence constitutes a bill of attainder, is frivolous. A bill of attainder is, as the name implies, a legislative action rather than a judicial one. *See SBC Communications, Inc. v. FCC*, 154 F.3d 226, 233 (5th Cir. 1998), *cert. denied*, 525 U.S. 1113, *and cert. denied*, 525 U.S. 1113 (1999).

Union Planters's second argument – that admission of the evidence violates Fed. R. Evid. 404(b)[7] – is more substantive. Vance introduced the evidence to show how Union Planters treated the class of women employees. In the context of a title VII suit alleging racial discrimination, evidence concerning an employer's "general policy and practice with respect to minority employment" "may be relevant to any showing of pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Similarly, evidence that Union Planters had been found to have discriminated against women in the past could help undermine its argument that it chose not to hire Vance only because of administrative concerns.[8]

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[7] That rule reads in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[8] *See also McCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980) (holding that evidence of a pattern of terminating older workers allowed a reasonable inference that plaintiff had been discharged on account of age); *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981) ("Dosier claims that the post-settlement incidents were part of a continuing pattern of discrimination. . . . [H]e is not prevented from using those incidents as evidence of a continuing pattern of discrimination by Miami Valley. Evidence of prior acts may clearly be used to establish the existence of a pattern or scheme. See Rule 404(b), Federal Rules of Evidence.").

In *EEOC v. General Dynamics Corp.*, 999 F.2d 113, 119 (5th Cir. 1993), we affirmed the admission of "arguably not relevant" evidence that the plaintiff had filed prior discrimination lawsuits against his employers. Despite the danger that such evidence could cause a jury to believe that the plaintiff was unreasonably litigious, we held that such evidence was appropriate, because the plaintiff had testified that he had prevailed in a previous discrimination lawsuit.

Union Planters called Yolaine Couser, a female bank officer, who testified that she had not been discriminated against and that she had never observed discrimination against women in her time at the bank. Davis also testified that he had hired a female to serve as Union Planters's anti-discrimination compliance officer. Because Vance is the party who first raised the pattern-of-discrimination issue, *General Dynamics* is merely instructive, not controlling. When a party has an opportunity to explore admitted evidence of prior acts "through examination of its own witnesses" and exercises that opportunity, the admission of potentially damaging evidence is not reversible error. *See Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1365 (10th Cir. 1987).

Relatedly, Union Planters makes no showing that the admission prejudiced it. It presented testimony from a female officer stating that in the years she worked for the bank, she had never seen discrimination against women. The jury might well have assigned more weight to this evidence about the firm's current practices than to Davis's brief admission that his firm had discriminated on one occasion in 1990. For these reasons, we see no

abuse of discretion in the decision to admit the evidence in question.

VI.

Title VII limits damage awards based on the number of employees the employer had during the "current or preceding calendar year." 42 U.S.C. § 1981a(b)(3). If, as the district court held, Union Planters had more than 500 employees, its potential liability is $300,000. If, as Union Planters argues, it employed only approximately 140 people, its liability is only $100,000. These limitations on damages look to the number employed "in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.*

A.

We must decide the meaning of "current or preceding calendar year." The district court held that it refers to the year of judgment; it is undisputed that at the time of judgment, Union Planters had more than 500 employees.

Union Planters correctly contends that "current year" refers to the year in which the discriminatory acts took place. We have interpreted "current year" to refer to the year in which the alleged discrimination occurred. *See Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.4 (5th Cir. 1980).

The district court emphasized that the "current year" language interpreted in *Dumas* was from a different part of title VII, and stated that no court has interpreted the

"current year" language of § 1981a(b)(3). The latter assertion is incorrect. In *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1348, 1354 (7th Cir. 1995), the court limited the damages assessed against a defendant based on the number of employees working for it at the time of the discriminatory firing. The district court's interpretation of "current year" was rejected also in *Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962, 965 (7th Cir. 1998). There is no reason to define "current year" to mean one thing in one part of title VII and something else in another.[9]

Sound policy analysis supports this reading of the statute. The best reason to use the "year of occurrence" is that any other interpretation allows parties to engage in gamesmanship by structuring companies, or timing the progress of lawsuits, to maximize gain or to minimize loss.

An additional reason is that we presume that part of the reason for the liability cap for smaller corporations is that such entities cannot afford to hire the specially trained human-resource personnel required to negotiate the shoals of modern employment law. These businesses are therefore provided some additional level of protection. Larger companies, better equipped to hire the relative expertise, are held to a more rigorous standard. This purpose would be defeated if the size of the company

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[9] *See Department of Revenue of Ore. v. ACF Indus.*, 510 U.S. 332, 342 (1994) (noting the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

were measured at the date of verdict rather than the date of commission of the suspect act.

B.

The district court held that even if 1995 were the "current year," Union Planters would have had more than 500 employees:

> Furthermore, even if the court were to use the time of the discriminatory act as the current year for the purposes of the statutory cap, the court would still find that the defendant had more than 500 employees. Union Planters Bank of Northeast Mississippi, which the defendant asserts had no more than 140 employees, did not even exist as of the date of the discriminatory act. The decision-maker, Pat Davis, was the president of First National Bank. The entity to be formed, Union Planters Bank of Northeast Mississippi, consisted of banks belonging to three different subsidiaries of Union Planters Corporation (specifically First National Bank, Sunburst Bank, and United Southern Bank). There was no single subsidiary which could realistically be considered the employer for purposes of the statutory cap. The allegedly discriminatory act was done on behalf of a large corporation by an agent of a large corporation, with well over 500 employees. Accordingly, regardless of how the term "current or preceding year" is applied, the statutory limit on damages should be set at $300,000.00.

In 1995, Pat Davis ran First National Bank and was charged with merging banks belonging to subsidiaries of First National Bank, Sunburst Bank, and United Southern

Bank. The product of that merger, Union Planters Bank of Northeast Mississippi, did not exist at the time of the employment action but did come into existence a few months thereafter, in July 1995. The period from then to December 31, 1995, is more than twenty weeks, so even though Union Planters Bank of Northeast Mississippi did not exist at the time of the discriminatory act, it could qualify as Vance's would-be employer under title VII. If it were the relevant employer, then the applicable cap on damages would be $100,000.

By denying Vance's post-verdict motion for discovery regarding Union Planters's size, the district court failed to develop the record with regard to several important facts. First, the court's analysis, which held Union Planters Corporation (the holding company that owned Union Planters Bank of Northeast Mississippi) to be the relevant employer, seems inconsistent with the order dismissing Union Planters Corporation as a defendant. Second, the court failed to engage in the searching inquiry called for by *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983), which is this circuit's leading precedent on the size of an employer for title VII liability purposes.

Under *Trevino*, the court must determine whether nominally independent entities – First National Bank, Sunburst Bank, and United Southern Bank – are a single employer for purposes of title VII liability. If so, their total employment should be aggregated.

Third, the record does not reveal who would have been Vance's employer before July 1995, had she been offered the job. Looking to who employed Carroll between March 15, 1995, and July 1, 1995, might answer

this question. The trier of fact would need to determine how many employees that firm employed in 1995 and 1994.

Any of these factors could affect the limitation on damages. Because the record is insufficiently developed for us to engage in that analysis, we remand for such a determination.

We therefore AFFIRM the judgment except with regard to the interpretation of § 1981a(b)(3), VACATE that portion of the judgment, and REMAND for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

YVONNE E. VANCE
Plaintiff

V.

No. 3:95-CV-154-B-A

UNION PLANTERS
BANK, N.A.

Defendants

ORDER

(Filed Apr. 21, 1999)

This cause comes before the court upon the defendant's motion to set statutory limits on punitive damages and amend compensatory damages award and motion for judgment as a matter of law or, in the alternative, a new trial. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.[1]

At the close of trial in this matter, the jury awarded the plaintiff $30,000.00 in compensatory damages for lost wages and benefits, $20,000.0 in compensatory damages for emotional pain and suffering, and $390,000.00 in punitive damages. The damages awarded by the jury are subject to the statutory limits set forth in 42 U.S.C. § 1981a(b)(3), which provides as follows:

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[1] In response to the defendant's motion, counsel for the plaintiff submitted the plaintiff's affidavit, which the defendant has moved to strike. The court finds that the defendant's motion to strike should be denied.

> [t]he sum of the amount of compensatory damages awarded under this section for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.00;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000.00;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000.00;
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.00

42 U.S.C. § 1981a(b)(3). Backpay, interest on backpay, or any other relief authorized under 42 U.S.C. § 2000e-5(g) is not included in the statutory cap. 42 U.S.C. § 1981(a)(b)(2).

The defendant asserts that the damages awarded by the jury should be reduced to $100,000.00 in accordance

with 42 U.S.C. §(b)(3)(B), noting that testimony produced at trial indicated that Union Planters Bank of Northeast Mississippi had no more than 140 employees during the "current or preceding year." The defendant contends that the term "current or preceding year" is determined as of the date of the discriminatory act. The plaintiff, however, asserts that the term "current or preceding year" should be determined as of the time of trial. The plaintiff, citing trial testimony of Pat Davis which indicated that the defendant, Union Planters Bank, currently has greater than 500 employees, maintains that the statutory cap should be $300,000.00 in accordance with 42 U.S.C. §(B)(3)(D).

The court notes that the issue of whether the term "current or preceding year" applies to the date of the act or the time of trial is one of first impression. The defendant has cited a few cases in which the term "current or preceding year" applied to the time of the discriminatory act; however, those cases were interpreting the term as it is used in 42 U.S.C. §2000e(b), which is a separate section concerning who is subject to liability under Title VII.[2] Neither the defendant nor the plaintiff has cited any case which had to determine the meaning of the term "current or preceding year" as it is used in 42 U.S.C. § 1981a(b)(3).

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[2] 42 U.S.C. §2000e(b) provides that an employer is subject to the provisions of Title VII if it has employed 15 or more employees in the current or preceding year. For purposes of determining Title VII liability, the term "current or preceding year," as used in 42 U.S.C. §2000e(b), applies to the date of the discriminatory act.

After much deliberation, the court finds that the term "current or preceding year" as it applies to the statutory cap is determined as of the date of the judgment. Not only does this interpretation coincide with the plain language of the statute, but it makes the most sense when viewed in light of the purpose of the statute. The statute was created to protect small businesses from outrageous judgments by limiting the amount of damages in accordance with the size of the business. The size of a business could change dramatically, in either direction, between the time of the act and the time of trial. To accomplish the purpose of the statute, yet still allow the plaintiff to reap the benefit of the jury award to which she is entitled, the statute must be read so that the current year means the year of the judgment. Since the defendant had more than 500 employees at the time of trial, the statutory cap to be applied is $300,000.00.

Furthermore, even if the court were to use the time of the discriminatory act as the current year for purposes of the statutory cap, the court would still find that the defendant had more than 500 employees. Union Planters Bank of Northeast Mississippi, which the defendant asserts had no more than 140 employees, did not even exist as of the date of the discriminatory act. The decision-maker, Pat Davis, was the president of First National Bank. The entity to be formed, Union Planters Bank of Northeast Mississippi, consisted of banks belonging to three different subsidiaries of Union Planters Corporation (specifically First National Bank, Sunburst Bank, and United Southern Bank). There was no single subsidiary which could realistically be considered the employer of

purposes of the statutory cap. The allegedly discriminatory act was done on behalf of a large corporation by an agent of a large corporation, with well over 500 employees. Accordingly, regardless of how the term "current or preceding year" is applied, the statutory limit on damages should be set at $300,000.00.

Finally, the defendant asserts that the $50,000.00 in compensatory damages awarded to the plaintiff should be subject to the statutory limit on damages. The $20,000.00 awarded for emotional distress clearly falls within the parameters of the statutory cap. However, the court finds that the $30,000.00 in lost wages and benefits is excluded from the statutory limit. Lost wages are excluded from the cap under 42 U.S.C. § 1981a(b)(2). Fringe benefits are similar to lost wages and are recoverable under 42 U.S.C. § 2000e-5(g). *See Cox v. American Castiron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Therefore, lost benefits are likewise excluded from the cap.

For the foregoing reasons, it is **ORDERED**:

that the defendants's motion to strike is **DENIED**;

that the defendant's motion to set statutory limits on punitive damages and amend compensatory damages award is **GRANTED in part;**

that the judgment entered in favor of the plaintiff is reduced to a total sum of $330,000; and

that the defendant's motion for judgment as a matter of law or, in the alternative, a new trial is **DENIED**.

THIS, the 20 day of April, 1999.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

YVONNE E. VANCE — PLAINTIFF

VS. — CIVIL ACTION NO. 3:95CV154-B-A

UNION PLANTERS BANK, N.A., ET AL. — DEFENDANTS

MEMORANDUM OPINION

(Filed Feb. 12, 2001)

This cause comes before the Court upon consideration of the parties' memoranda and submissions of evidence regarding the issues on remand from the Fifth Circuit Court of Appeals. *See Vance v. Union Planters*, 209 F.3d 438, 447 (5th Cir. 2000). Upon due consideration of said memoranda, supporting documents and examination of the record in this cause, the court is ready to rule.

As the facts in this cause are fully stated in this court's January 22, 1998 Memorandum Opinion as well as the Fifth Circuit's opinion in *Vance v. Union Planters Corporation, et. al.*, 209 F.3d 438 (5th Cir. 2000), the court will not repeat the same herein. The issues before the court are as follows:

1. Who was the relevant employer of the plaintiff?
2. Who would have been the plaintiff's employer before July 1995 had she been offered the job?
3. Under *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983), are nominally independent entities – First National Bank, Sunburst Bank and United Southern Bank, a single employer for purposes of Title VII liability?

See Vance, 209 F.3d at 447. Pursuant to the Fifth Circuit's ruling, this court set a time period for discovery as to the relevant issues and a briefing schedule for the parties to submit evidence and arguments to the court.[1] Having duly reviewed voluminous submissions by the parties, the court finds it is evident that in matters concerning administrative personnel, First National Bank ("FNB"), Sunburst Bank ("SB"), and United Southern Bank ("USB") were an integrated entity for purposes of Title VII liability.

As an initial matter, the court holds that notwithstanding the January 22, 1998 ruling on the defendants' motion for summary judgment, wherein the court stated that "the plaintiff [had] failed to create a genuine issue of material fact as to the existence of a single integrated enterprise . . . ," it is clear that the Fifth Circuit did not find said summary judgment opinion controlling.[2] Therefore,

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[1] Originally, the court granted a sixty (60) day discovery period in which to take depositions and complete interrogatories, requests for production and requests for admissions. *See Vance v. Union Planters, et al.*, Cause No. 3:95cv154-B-A, docket entry #183 (dated May 23, 2000). This period was to be followed by a briefing schedule allowing thirty (30) days thereafter for the plaintiff to submit a brief in support of her position on remand, followed by 15 days for the defendant to submit its reply brief, and finally allowing the plaintiff fifteen (15) days to file her rebuttal brief. *Id.* This period was extended twice thereafter. *Id.* at docket entries #207 & #218.

[2] "First, the [district] court's analysis, which held Union Planters Corporation (the holding company that owned Union Planters Bank of Northeast Mississippi) to be the relevant employer, seems inconsistent with the order dismissing Union Planters Corporation as a defendant." *Vance v. Union Planters*, 209 F.3d at 447.

the court has examined the role of Union Planters Corporation ("UPC") as well as the defendant, Union Planters Bank, N.A., in light of the new evidence submitted by the parties.[3]

It is evident, from the memoranda and evidence submitted by the parties, that several pertinent facts are undisputed. First, there is no dispute that the plaintiff, Tom Carroll, Ben Rawlins, Jackson Moore, Pat Davis, and other employees of FNB, SB, and USB received payment from Union Planters National Bank of Memphis, Tennessee, as its employer identification number appears on their W-2 forms during the relevant time period.[4] Second, at the time in question when Tom Carroll was hired, he was controlled and directed by Pat Davis, President and CEO of FNB.[5] Third, Union Planters Corporation was interrelated with its subsidiaries, including FNB, SB, and

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[3] As of January 1, 1995, Union Planters Corporation was the sole shareholder of Union Planters Bank, Memphis, Tennessee; First National Bank of New Albany; United Southern Bank; and Sunburst Bank. *See* defendant's response to plaintiff's memorandum of points and authorities, at 21; *see also* Deposition of Jackson Moore, pp. 15-16, and Deposition of Benjamin Rawlins, pp. 34-35, attached as exhibits 1 & 2 to plaintiff's submission of evidence. Union Planters Bank of Memphis, Tennessee was a subsidiary of UPC, as were FNB, SB, and USB; however, Union Planters Bank of Memphis, Tennessee served as the receiving bank when the charters for the other subsidiaries were surrendered. *See* defendant's response to plaintiff's memorandum of points and authorities, at 3, n.2.

[4] *See* W-2 forms attached as exhibit 11 to plaintiff's submission of evidence.

[5] *See* defendant's response to plaintiff's memorandum of points and authorities, at 20; plaintiff's memorandum of points and authorities, at 24.

USB during the relevant period.[6] This interrelation included, but was not limited to, filing consolidated reports to the SEC and other federal agencies, filing consolidated tax returns, serving as the centralized payroll entity, and having Common Management Agreements executed and followed by the subsidiaries.[7] Finally, UPC, at the time in question, was the sole owner of 100% of its subsidiaries' stock.[8]

On August 19, 1998, a jury entered a verdict for the plaintiff in this matter. Pursuant to said verdict, a Judgment was entered in favor of the plaintiff for $50,000.00 in compensatory damages and punitive damages in the amount of $390,000.00, with post judgment interest at the rate of 5.271 per cent per annum, according to law.[9] Thereafter on April 21, 1999, this court entered an order ruling on several post-trial motions which, among other things, reduced the total sum award to the plaintiff to $330,000.00.[10]

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[6] *See* defendant's response to plaintiff's memorandum of points and authorities, at 17.

[7] *See* defendant's response to plaintiff's memorandum of points and authorities, at 13, 17-19.

[8] *See* defendant's response to plaintiff's memorandum of points and authorities, at 21; *see also* Deposition of Jackson Moore, pp. 15-16, and Deposition of Benjamin Rawlins, pp. 34-35 attached as exhibits 1 & 2 to plaintiff's submission of evidence.

[9] *See Vance v. Union Planters, et al.*, Cause No. 3:95cv154-B-A, docket entry #156 (dated August 19, 1998).

[10] *See Vance v. Union Planters, et al.*, Cause No. 3:95cv154-B-A, docket entry #175 (dated April 21, 1999).

The reduced award, mandated by this court in April 1999, was intended to comply with statutory limitations as stated in 42 U.S.C. § 1981a. It is with an eye to said limitations that the court has now re-examined the issue of damages. Pursuant to Title VII, punitive damages awards are limited based on the number of employees an employer had during the "current calendar year." 42 U.S.C. § 1981a(b)(3). The current calendar year has been interpreted as the year in which the alleged discrimination occurred. *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 (5th Cir. 1980). In the instant cause it is stipulated that the discriminatory act took place in March 1995.[11] Therefore, the current calendar year for purposes of this action would have been the year of occurrence – 1995.

Finding that 1995 is the appropriate year under which the court should examine application of the 42 U.S.C. § 1981a, the court must next determine who the plaintiff's employer was in 1995; specifically, who was her employer as of the date of the incident giving rise to this action – March 15, 1995. As directed by the Fifth Circuit, the court has examined factors, including but not limited to, who was Tom Carroll's employer during 1995 and who was the plaintiff's and Tom Carroll's employer pursuant to W-2 forms for 1995, as well as testimony of numerous employees and administrators for FNB, SB, UPC and USB. Upon due consideration of all relevant evidence submitted by the parties, the court finds that Tom Carroll was assigned to SB from January 1, 1995 to

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[11] *See* plaintiff's memorandum of points and authorities in support of her position on remand, at 10; letter from defendant's counsel to Judge Neal Biggers dated January 8, 2001.

March 31, 1995; thereafter, he was assigned to USB from April 1, 1995 to July 1995.[12] The facts show that had the plaintiff been hired instead of Carroll, the plaintiff would have been employed by SB during the time in question. Thus, the court finds that SB was the plaintiff's employer in 1995.

Employee counts submitted by the defendant show that during the relevant time, SB had more than 500 employees.[13] Thus, under 42 U.S.C. § 1981a(b)(3), the appropriate measure of damages should be capped at $300,000.00. However, pursuant to the Fifth Circuit's decision in this matter and precedent in this Circuit, the court must nonetheless inquire into whether SB, FNB and USB were an integrated enterprise. *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983).[14] In making this inquiry, the court is guided by *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983), wherein the Fifth Circuit stated:

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[12] It is undisputed that Tom Carroll was assigned to USB in April 1995 in order to fill a position vacated by Hardy Farris, President of USB in Oxford. *See* defendant's response to plaintiff's memorandum of points and authorities, at 20; plaintiff's memorandum of points and authorities, at 30.

[13] *See* employee count printouts, attached as exhibit "E-1" to defendant's submission of evidence, identified by Bates No. 6161-6173.

[14] "[T]he court failed to engage in the searching inquiry called for by *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983),. . . . Under *Trevino*, the court must determine whether nominally independent entities . . . are a single employer for purposes of Title VII liability." *Vance*, 209 F.3d at 447.

> The term "employer" as used in Title VII of the Civil Rights Act was meant to be liberally construed. Over the past decade, numerous courts have drawn upon theories and rules developed in the related area of labor relations in determining when separate business entities are sufficiently interrelated for an employee whose Title VII rights have been violated to file a charge against both entities. Thus the rule has emerged that superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise: a single employer. Factors considered in determining whether distinct entities constitute an integrated enterprise are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

Trevino, 701 F.2d at 403-404 (citations omitted). By analyzing evidence submitted by both parties in light of the *Trevino* factors stated above, the court finds that during the relevant time period, in matters of administrative personnel, all decisions were made by Pat Davis in his position as the individual with administrative control over the Oxford branches of SB and USB as well as the President and CEO of FNB and said administrative decisions were on behalf of UPC; as such, SB, FNB, and USB were an integrated enterprise for purposes of Title VII liability. According to the employee counts submitted by the defendant, the three entities had an aggregated total number of employees well in excess of 500.[15] Consequently, the appropriate measure

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[15] *See* employee count printouts, attached as exhibit "E-1" to defendant's submission of evidence, identified by Bates No. 6161-6173.

of damages under 42 U.S.C. § 1981a(b)(3) would be $300,000.00.[16]

It warrants mention that the sole defendant at the trial of this cause was Union Planters Bank, N.A. ("UPBNA"). UPBNA, while not technically in existence at the time this case was filed or at the time that this court's summary judgment opinion was issued, was substituted for Union Planters Bank of Northeast Mississippi ("UPBNE") two months prior to trial as the successor in interest to UPBNE under Rule 25(c) of the Federal Rules of Civil Procedure. UPBNE was originally a defendant to this suit; however, it was not in existence in March 1995 – it did not come into existence until July 1, 1995 when FNB changed its name to UPBNE. Union Planters Bank of Memphis, Tennessee was a subsidiary as well as FNB, SB, and USB were all subsidiaries of UPC in March 1995. Union Planters Bank of Memphis, Tennessee served as the receiving bank when the charters for the other subsidiaries were surrendered in the process of the merger of these banks into the Union Planters system.[17] Thus, UPBNA was the successor entity of FNB, as well as the other entities: Union Planters Bank of Northwest Mississippi (the name changed entity that was formerly USB) and Union Planters Bank of Mississippi (the name

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[16] The court notes that the amount of damages is capped at $300,000.00 regardless of whether the three nominally independent entities, SB, FNB, and USB are considered an integrated enterprise as the court has found that SB alone had over 500 employees at the relevant time and thus would also cap the damages at $300,000.00.

[17] *See* defendant's response to plaintiff's memorandum of points and authorities, at 3, n.2.

changed entity that was formerly SB). These entitles were also subject to the July 1, 1995 name changes as was FNB.[18] Under the findings of the court, as stated herein, UPBNA, as the defendant in this suit and the successor entity of the previously named banks, is liable to the plaintiff for damages in the amount of $300,000.00, and a judgment will issue in that amount.

SO **ORDERED,** THIS, the 9 day of February, 2001.

/s/ Neal B. Biggers, Jr.
NEAL B. BIGGERS, JR.
SENIOR U.S.
DISTRICT JUDGE

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[18] *See* defendant's response to plaintiff's memorandum of points and authorities, at 3, n.2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

YVONNE E. VANCE — PLAINTIFF

VS. — CIVIL ACTION NO. 3:95CV154-B-A

UNION PLANTERS BANK, N.A., ET AL. — DEFENDANTS

JUDGMENT

(Filed Feb. 12, 2001)

In accordance with the memorandum opinion this day issued in the above styled and numbered cause, judgment is rendered in favor of the plaintiff, Yvonne E. Vance, against defendant Union Planters Bank, N.A. in the amount of three hundred thousand dollars ($300,000.00) together with interest accruing according to law.

SO **ORDERED**, THIS, the 9 day of February, 2001.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-60216

YVONNE E VANCE

Plaintiff-Appellee

v.

UNION PLANTERS CORP; ET AL

Defendants

UNION PLANTERS BANK, N A

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

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ON PETITION FOR REHEARING EN BANC

(Filed Feb. 13, 2002)

(Opinion 1/10/02, 5 Cir., ___, ___ F.3d ___)

Before JONES and DeMOSS, Circuit Judges, and FELDMAN,* District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

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* District Judge of the Eastern District of Louisiana, sitting by designation.

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request or one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. [Illegible]
United States Circuit Judge